

United States
COURT OF APPEALS
for the Ninth Circuit

M. C. SCHAEFER,

Appellant,

vs.

SAM MACRI, DON MACRI, JOE MACRI, W. R.
McKELVY and CONTINENTAL CASUALTY
COMPANY, a Corporation,

Appellees.

REPLY BRIEF OF APPELLANT
M. C. SCHAEFER

Replying to Briefs of Appellees:

W. R. McKelvy,

Continental Casualty Company,

Sam Macri, Don Macri and Joe Macri.

M. C. SCHAEFER, *Appellant,*
Per Se.

3535 E. Burnside St.
Portland, Oregon

FILED

SUBJECT INDEX

Page

| | |
|----------|---|
| Argument | 1 |
|----------|---|

TABLE OF CASES

| | |
|---|----|
| Aberthaw Constr. Co. v. Cameron, 194 Mass. 208, 80 N.E. 478, 120 Am. St. Rep. 542 | 15 |
| Dorsey Mach. Co. v. McCaffrey, 139 Ind. 545, 38 N.E. 208, 47 Am. St. Rep. 290 | 15 |
| Franklin Union v. People, 220 Ill. 355, 77 N.E. 176, 4 L.R.A. (N.S.) 1001, 110 Am. St. Rep. 248 | 15 |
| Hindman v. First Nat'l Bank (C.C.A. 6th), 98 F. 562, 48 L.R.A. 210 | 15 |
| Joplin Mercantile Co. v. United States (C.C.A. 8th), 213 F. 926, Ann. Cas. 1916C, 470 | 15 |
| Rich v. Daily Creamery Co., 296 Mich. 270, 296 N.W. 253, 134 A.L.R. 232 | 15 |
| Standard Oil Co. v. State, 117 Tenn. 618, 100 S.W. 705, 10 L.R.A. (N.S.) 1015 | 15 |
| State v. Eastern Coal Co., 29 R.I. 254, 70 A. 1, 132 Am. St. Rep. 817, 17 Ann. Cas. 96 | 15 |
| West Virginia Transp. Co. v. Standard Oil Co., 50 W. Va. 611, 40 S.E. 591, 56 L.R.A. 804, 88 Am. St. Rep. 895 | 15 |
| Zinc Carbonate Co. v. First Nat'l Bank, 103 Wis. 125, 79 N.W. 229, 74 Am. St. Rep. 845 | 15 |

TEXT MATERIAL CITED

| | |
|------------------------------|----|
| 33 A.L.R. 1212 | 15 |
| 11 Am. Jur., p. 579 | 15 |
| 11 Am. Jur., p. 584, Sec. 52 | 8 |
| 4 B.R.C. 246 | 15 |

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ARGUMENT

First, let me congratulate counsel for the Defendants. They have so skillfully handled what little they have had to work with that their briefs standing alone might be persuasive to persons not familiar with the facts. Hence, I again urge that this court *read all of the transcript carefully!*

Next, let me show in plain, simple language of a layman just what happened.

My story begins early in 1944. At that time defendant W. R. McKelvy, a prominent Seattle attorney, represented defendant Continental Casualty Company. As a matter of fact, so did Willard Skeel and other members of the firm of Skeel, McKelvy, Henke, Evanson & Uhlmann. This firm had been general counsel in Washington for Continental Casualty Company for years before and still is.

Sam Macri, Don Macri and Joe Macri were partners, with Sam Macri the head of the firm. They had a large volume of contracts with the Government and with the State of Washington and now manage three or four companies doing a huge volume of business. But the head of the Macri Organization I dealt with, Sam Macri, during the time I was involved with them, while testifying under oath that he personally figured the job of which I had taken a part, and had been in the construction business 26 years, *could not even read the simplest figures* on a plan (See Transcript of Testimony in case No. 11707—Circuit Court of Appeals—Ninth Circuit, Pages 1422 ff. and 1656 ff.). Yet, despite the complete lack of qualification of the Macris to engage in any kind of construction work, Continental Casualty Company in all Macris' deals issued bonds guaranteeing their performance and payments. Why? Were the Macris merely fronting for Continental Casualty Company or McKelvy and Skeel? Then in addition we find Clyde Philp, attorney-in-fact for Continental Casualty Company, who is a partner with one Goerig, and the two are silent joint venturers with the Macris on the jobs I was involved with and many others before and after. Note that Philp by reason of his posi-

tion as attorney-in-fact knows or can determine amounts of other bids being submitted and can therefore tip off someone fronting for him and others as to what figures to bid without doing any estimating of their own.

While it does not directly concern this case, the combination of persons outlined above existed for some time before I got innocently involved with them. This group has a reputation among others who have dealt with them that the things they did to me were part of a consistent pattern of what they do to others who come in touch with them.

Such was the basic set-up when I came into the picture by taking a subcontract with the Macris early in 1944, although I didn't learn of it until later on.

I think and have tried to show that all this is wrong to allow an attorney to mishandle the trust and confidence of his clients and in conspiracy with a bonding company and a pseudo-contractor as a front and in partners with the attorney-in-fact for the bonding company, who is in a strategic position to know other prospective bidders' figures, try to drive legitimate contractors into slavery to them or else by every means at their command including threats of physical violence and intimidation try to drive them out of business. This is wrong not only in its immediate and direct effect on the parties involved but also wrong to permit it to continue and possibly spread elsewhere throughout the world where weak and short-sighted men may be found who are willing to yield. I refuse to yield. With truth and confidence in Christ there is no excuse for accept-

ing the intimidations of a power having existence only in mortal belief. I am subordinate to no circumstances and to no person—only to the one true power and being eternal, God.

To continue my narrative, watch how the pattern of intrigue unfolds!

First, the Macris failed to do their preliminary work timely or properly and failed to supply proper or adequate quantities of material causing me extra cost and delay. Then they failed to pay me even the basic amounts required under my contract. The financial aspect was getting serious after several months of this.

Then I began to hear stories from others who had been similarly treated by the Macris. Becoming concerned, I sought from W. R. McKelvy what I thought was competent legal help to (1) terminate the one contract I was then working on and attain the reasonable value of the work done to date, and (2) to terminate a second subcontract with the Macris, work on which had not commenced.

So, I unwittingly walked into Mr. McKelvy's office. I told McKelvy everything—my finances, my problems, the parties involved, namely (so far as I then knew), Continental Casualty Company and the Macris, and what I wanted done. McKelvy accepted this employment, assured me my desired results would be obtained, possibly by negotiation between him and one Tom Holloman, an attorney formerly associated with McKelvy's office and with whom McKelvy claimed to have a very close relationship and who McKelvy said represented

the Macris. Mr. Skeel, Sr., sat in on part of this conference. In the transcript (pp. 407-410) you will note that by interoffice memo prepared shortly after I retained McKelvy, he and one of the men in his office confirmed that a cause of action existed and indicated what the grounds and procedure were. It is interesting to note that this memo was inadvertently handed to me by McKelvy when I called his hand in October of '45 and he was so shaken and upset he was not aware he was giving me this item when he turned my files back to me.

But to continue my story with McKelvy, first he dragged me on for some time on the excuse he was negotiating with Macris' attorney; then he told me that by reason of a strictly phony, put-up job involving the son of one of the Macris (who had been arrested for embezzlement), the assets of the Macris had all been safely hidden and that chances of my prevailing in a suit against Continental Casualty were slim. In the meanwhile he kept promising me that suit was being prepared by his office and would soon be ready to file. McKelvy later suggested that I convey all my property to my brother or someone I could trust and beat my creditors. He told me at the time about a similar maneuver by another contractor resulting in beating a bank out of \$83,000 and that he, McKelvy, was able to get the contractor cleared. I refused to engage in this fraud.

A few days thereafter McKelvy failed to keep an appointment with me; and was so obviously stringing me on that I walked into his office unannounced on October 20, 1945, for a showdown. McKelvy then told me

he couldn't file suit against Continental Casualty Company as they were one of his firm's biggest accounts, and in response to my question: "How much time do I yet have?", stated that I had only about a month in which to file. He then handed back my file and because of his being so unnerved also gave me part of his file. McKelvy thus attempted to string me on till I was barred by the statute of limitations or by committing a fraud.

I did thereafter retain another attorney who first notified the Macris that suit would be filed on a day certain if my claim was not previously paid. The day before the deadline given the Macris a purely fictitious suit was filed by the Macris against me in Portland on the second subcontract mentioned above. I assert that this second subcontract was intentionally left open to give the several defendants herein one more chance to snow me under financially. A letter was supposedly written by McKelvy for the purpose of terminating this second subcontract (see p. 411 Transcript of Record) but his firm denied it was sent and Macris denied receiving it.

This Portland suit was, after much expense and bother to me, set forth in my Yakima suit as a counter claim and on the hearing before Judge Driver was summarily dismissed and judgment was given to me for \$1.00 — incidentally not yet paid. I was in such a precarious financial condition that even another straw could break me, and the defendants no doubt intentionally saved this one item thinking it would be that straw. By almost superhuman effort I kept it from being so.

Then followed the litigation. First, Continental Casualty Company itself informed my attorney in Yakima of the involvement of Philp and Goerig and asked me to amend and name them as additional defendants, assuring me that Philp and Goerig were financially very well off and that I could probably collect any judgment from them. Yet Continental Casualty Company knew then that a year and a half before Macris and Philp and Goerig had terminated their joint venture and were not liable to me. Continental Casualty Company and McKelvy also tried by subtle suggestion to get me to sue in damages for breach of contract, knowing if I did that Continental Casualty Company would be relieved under its bond; that Philp and Goerig were released by reason of an alleged termination agreement with the Macris and that the Macris would be relieved by reason of hiding their assets and assigning to a bank the only assets subject to execution. Fortunately, I forestalled that maneuver by suing in quantum meruit (contrary to suggestion of my attorney). After judgment in my favor in the trial court at Yakima against Continental Casualty Company and Macris (the trial Judge holding that as to me, Philp and Goerig were out by reason of the termination agreement) came a most flagrant and wilful abuse of the judicial processes. The time for appeal by the defendants Macris expired with no action having been taken by them, but Continental Casualty Company filed a separate appeal timely, hence the Circuit Court of Appeals then permitted the Macris to file anyway. All the way through this whole course of litigation it was the Continental Casualty Company *which led the way*,

and every conceivable device to cause me delay and added cost was used by the Continental Casualty Company and their co-conspirators; and even when the time came finally to pay the judgment the attorneys of Continental Casualty Company had to get McKelvy's approval to delete certain words from the release language on the back of the draft. It is interesting to note the claim by Macris' attorney that I broke the Macris as a result of this judgment. The judgment against them, and also against Philp and Goerig, in favor of Continental Casualty Company has never been paid and the Macris now head and operate several firms doing a large volume of business; and Philp is still engaged in construction work; and Continental Casualty Company is still bonding the Macris. Abuse of legal proceedings is actionable as conspiracy. See 11 Am. Jur., p. 584, Sec. 52, and cases therein cited.

Always running through this is the obvious thinking of the Defendants that at any one of the steps they might succeed in killing me off because I might not be able financially to follow through.

And speaking of killing me off, I have been personally threatened by a B. J. Rask if I persist in this suit. He is indirectly associated with the Macris and could have entered the picture to attempt to intimidate me only by reason of concert with the other Defendants. The attorney for the Macris at the last hearing in Seattle made similar intimidating remarks and hints of foul play. Following is a verbatim copy of affidavit I recently filed in this court which includes the conversation between Rask and myself:

IN THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT

M. C. SCHAEFER, an individual,)
vs.)
Appellant,)
SAM MACRI, DON MACRI,) No. 13129
JOE MACRI, W. R. McKEL-)
VY and CONTINENTAL)
CASUALTY COMPANY,)
a Corporation,)
Appellees.)
STATE OF OREGON)
County of Multnomah) ss.

I, M. C. SCHAEFER, being first duly sworn on oath, depose and say:

That I am the Appellant in this case and the Plaintiff below.

That all matters stated in this Affidavit are true as I verily believe.

That all matters stated in the Motion for Order Permitting Filing of Supplemental Complaint heretofore filed in the District Court in Seattle, Washington on August 6, 1951 appear in the Transcript of Record on pages 516 to 518.

That the facts set forth in the above Motion for Order Permitting Filing of Supplemental Complaint wherein W. R. McKelvy is shown representing the Macris and Continental Casualty Company in the Superior Court, King County, Washington first became

known by me on June 25 and 26, 1951, at which time I checked the records in the Clerk's office of said Court.

That the following is a copy of a memorandum made immediately after Mr. B. J. Rask left my office on or about March 8, 1951.

"B. J. Rask came to our office (Concrete Construction Co.) in Portland a couple of times and asked for me, but I was not in. He also phoned in a number of times and asked for me, but the book-keeper told him I was not in and suggested that he talk to Mr. Wheeler, so, after not being able to contact me for a number of times, he talked to Mr. Wheeler about wanting to handle our insurance and bonding business, saying that he could do us a lot of good and would like right then to come and talk it over, but Mr. Wheeler told him he had an appointment out of the office and that our outfit would not be in a position for a couple of months where we could go into general contracting. This man said, 'I'll call again in a few days'. So, he again called and told Mr. Wheeler that he was looking for organizations like ours that knew what they were doing and could perhaps help us to the needed money; that he wanted to come over and discuss the matter.

"They then set a time for March 8, 1951, at which time I was present. As this man came into the rear office with Mr. Wheeler, I greeted him and he pulled up a high stool and, pointing to the swivel chair and an ordinary chair, said, 'I'll take this; I always like to look down on my victim'. Mr. Wheeler told this man that we had carried our insurance and bonding business with the same outfit for a long time and that we were not in a financial position to get into general contracting; that a couple of contractors wanted us to join up with them, but we could not add much to the bonding capacity

of such an organization in view of the pending law-suit. This man then said, 'Why, you have the equipment and organization that surely would help on that'. Mr. Wheeler said, 'But Mr. Schaefer wants to keep the equipment and property clear, at least until the suit is settled'. This man then turned to me and said, 'I think you should go up to see these fellows (Defendants below) and settle this out of court. Take what they give you and go on with your contracting business'. I said, 'I'm not contacting them. They know where I am. If they want to settle this thing, I'm agreeable to a settlement, but it will have to be substantial in amount.' He said, 'They will not contact you. You can see why. If you want to tell me, I'll see what I can do on it'. I said, 'No, we'll just let it ride as is'. He said, 'You can't win in a thing like this. The big boys have got this all buttoned up. They control the attorneys and the judges. Who do you think appoints the judges? The big money fellows do, of course.' He then told of a suit he was involved in in Montana and said, 'We had a solid case, but the copper companies had the Governor and all the judges in their back pocket. There are just so many technicalities that a layman can't hope to stand a chance. We didn't, and we had good attorneys on the job. The court will delay, they will switch judges and just anything. These judges are human like everybody else. They are bought off. They are appointed to a life job, but the fellows that get them appointed can depend on them to decide in their favor and they had better decide it as they are told. The little fellow just hasn't got a chance.' I said, 'Well, I don't know about that'. He said, 'They confuse the thing and drag it out for years and they will drag you through the mud so you will look like a criminal. Your reputation will be shot. They will dig up all of your past and, boy, you will just get worn out. It'll take years and you won't get anything out of it then.' I said, 'They can dig all they want to. I'm not afraid of anything

likethat.' He said, 'They will lie about you. You just can't get away from it. They just tell the judge what to do and he does it and if he doesn't want to, they will switch around until they get one that will. You just can't win. All these judges can be reached and the big boys have got the money. You'll be smeared, discredited and broke. The papers won't carry your story, but they will print any smear the other fellow wants to put out.' I said, 'I don't know about that. The Federal Judges have a life job. They don't need the money. Their job is based on honor. I think the wheels of justice will always grind exceedingly fine and things will work out O. K. in the end.' He said, 'You will never get anything like you expect out of it anyway'. I said, I think I will. That Yakima suit has cost me more than \$46,000.00 out of pocket money, plus the loss of money for all the years that we should have been in the general contracting business. My line, in the first place, is general contracting. Then I have four inventions that ought to be on the market right now and should have been for a number of years and I should be working on an automatic reader and a number of other inventions and some of these and perhaps including the automatic reader should be on the market now. It will take about \$60,000.00 to put the drill-in-tie on the market and at least another \$35,000.00 to develop the automatic reader. The other three inventions that should have been on the market a long time are a saw, a hammer and a drill-in-bolt. Those items do not require much money to get them onto the market, but I have not been able to raise enough money to get them through the patent office sooner. If they haven't damaged me to the extent of my claim, they haven't damaged me a dime.' He said, 'If I were you, I'd go up there and take what they gave me and come back and go to work. I wouldn't get too tough about this thing. I'd think of myself first and if you don't care, then I'd think of my family if I were you. Think it over.' "

That Mr. B. J. Rask has phoned my office more than nine times since March 8, 1951 and by very subtle language has reminded me of the impending fate if I persist in my present course. Mr. B. J. Rask has by flattery tried to induce Gale G. Wheeler to leave Concrete Construction Co. and go to work for Bitar Brothers (Empire Construction Co.) who I am informed and on information and belief allege are relatives of Mr. Rask and also very good friends of the Macris. Mr. B. J. Rask has also stated by phone to Gale G. Wheeler (to which conversation I was listening in on another phone, unknown to Rask) that the Macris are now big operators, and that they are now operating three or four different companies.

That I have made statements in the complaints and hearings to the effect that I have suffered serious monetary damage in the preparation and conduct of the litigation at Yakima, Washington, more fully set forth in the complaint herein, and that it has cost me in excess of \$46,-000.00 to prosecute that suit, for which I have not received any reimbursement, and I now state that Mr. L. R. Hendershott, a Certified Public Accountant, who testified to the accounts in the Yakima case, has offered to testify to the amount of this damage. The judgment for \$1.00 rendered in my favor in connection with job specification #1068, which is the job in connection with which the malicious suit was filed against me in Portland, Oregon, has not been paid (see Exhibit N, page 463 of Transcript of Record, second paragraph).

M. C. SCHAEFER.

SUBSCRIBED and sworn to before me this 1st day of March, 1952.

GOLDADA W. TOOKE,
Notary Public for Oregon.
My Commission expires: 6/11/54.

To help you visualize the story outlined above and pleaded in my complaints, I have prepared a sketch graphically portraying the interlocking interests and the various actions of the parties. Copy of this graph is attached and by this reference made a part.

My damages briefly are the extra non-taxable costs in my Yakima suit, the costs of the defense of the wholly groundless suit in Portland, mental anguish as extreme, excruciating and protracted as can be imagined, plus loss of income from my concrete business (I was forced to rely on the personal credit of one of my employees in the amount of \$500.00 in order to exist at all), loss of income from being unable during all this period to pursue my regular business, that of being a general contractor in which field I can show earnings of very substantial amounts, and loss of income from being unable to perfect and market certain new inventions I have now patented, or on which I have patents pending.

Answering Continental Casualty Company's brief specifically so far as I read it, they say only two things, (1) that they merely appealed a close case in the usual course of business, and (2) that everything prior to the case at Yakima was only the act of an employee or

agent and the Corporation is not liable for acts of the agent.

A corporation can be held liable for damages in conspiracy on account of acts of its agents or employees. See 47 Am. Jur., p. 579, and *Hindman v. Bank* (CCA 6th) 98 F. 562; 139 Ind. 545; 194 Mass. 208; 50 W. Va. 611; 103 Wis. 125 and 17 Anno. Cases 102; 194 Mass. 208; 220 Ill. 355; 213 F. 526; 117 Tenn. 618; 27 R. I. 254; 79 N.W. 229; 33 A.L.R. 272; 4 B.R.C. 246. Furthermore see *Rich v. Daily Creamery Co.*, 296 Mich. 270, 296 N.W. 253; 134 A.L.R. 252, holding a corporation liable in civil conspiracy and setting up clear tests of the sufficiency of a pleading in conspiracy.

Neither McKelvy's nor the Macris' brief requires specific answer.

In general, the hearings to date and the briefs by Defendants talk about everything except this case. These Defendants misquote and misstate the facts and give a wholly erroneous picture of what happened. There is only one way to determine the merit of my appeal; i.e., after reading this reply brief, then read my complaints.

I propose to go more deeply into this matter at the hearing on April 9, unless you are fully satisfied from your reading of the record, but bear in mind that the principal actors in this drama are Continental Casualty Company and McKelvy & Skeel, using their confidential information and their high position for personal gain through such willing participants, though generally incompetent, as the Macris et al., and using every device

legal or extra-legal to crush legitimate operators if they cannot succeed in debasing them.

Respectfully submitted,

M. C. SCHAEFER, *Per Se.*